(2)

No. 83-1754

In the Supreme Court of the United States

October Term, 1983

PAULETTE THOMPSON MASSEY,
Petitioner,

vs.

EMERGENCY ASSISTANCE, INC.,

and

CITY OF KANSAS CITY, MISSOURI, a municipal corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT KANSAS CITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner, Paulette Thompson Massey, has inaccurately and imprecisely stated the questions presented for review by this Court. The questions presented to the Court for review arise out of the application of the terms "employer" and "any agent of such a person" as contained in 42 USC §2000e (b) which reads, in pertinent part,:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States. . .

The questions arising out of application of these terms are:

1. Can the work force of the Petitioner's employer, Emergency Assistance, Inc., a Missouri not-for-profit corporation, having less than fifteen (15) employees, be combined with the work force of Kansas City, Missouri (admittedly in excess of 15) in order to meet the jurisdictional requirement of 15 employees under 42 USC §2000e (b)? In other words, does the term "employer" permit aggregation of a not-for-profit corporation with a municipal corporation as a single "employer" simply because the municipality funds the not-for-profit corporation as an independent contractor pursuant to a federal grant program long since terminated?

2. Does the term or phrase "any agent of such a person" as used in 42 USC §2000e (b) include independent contractors? In other words, has the statute modified

the common law concept of agency to include independent contractors as agents?

3. Did the trial court clearly err in finding that Emergency Assistance, Inc. was not the agent of Kansas City?

4. Did the District Court and the Court of Appeals clearly err in finding under the test of *Baker v. Stuart Broadcasting Company,* 560 F.2d 389 (8th Cir. 1977) that Emergency Assistance, Inc. and Kansas City should not be found to be a single entity and a single employer pursuant to 42 USC §2000e (b)?

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REFERENCE TO REPORTS OF OPINIONS

The opinion of the Court of Appeals is reported at 724 F.2d 690 and the opinion of the Trial Court is reported at 580 F.Supp. 937.

JURISDICTION OF THIS COURT

Jurisdiction of this court to review the judgment of the Court of Appeals is pursuant to 28 USC §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Petitioner would have the Court believe that there is a Fourteenth Amendment issue in this case. The Trial Court heard no evidence supporting such and so this Respondent will not speculate further at this time.

Obviously, interpretation of 42 USC §2000e (b) as to the meaning of "employer" and "any agent of such a person" is at issue in this case, but this case raises no other issues under the Statutes or Constitution of the United States.

STATEMENT OF THE CASE

The Petitioner's statement of the case is somewhat distorted.

This is a Title VII sex discrimination case with the seemingly obligatory §1983 count thrown in. The 42 USC §1983 claim deserves no comment since no evidence was adduced at trial to support it.

The Title VII claim arises on the basis of an unfortunate incident contrived by the Petitioner. The Petitioner was employed as Office Manager, also called Assistant Executive Director, in the office of a Missouri not-for-profit corporation which contracted with Respondent City of Kansas City, Missouri to operate an emergency assistance or public charity program funded by the City with United States Department of Housing and Urban Development (HUD) funds pursuant to Title I of the Demonstration Cities and Metropolitan Development Act of 1966 as a part of the "Model Cities" program. The

corporation never had fifteen (15) employees and thus to assert Title VII jurisdiction EEOC alleged City involvement as "employer" within the meaning of such term in 42 USC §2000e (b).

The corporation was operated by a Board of Directors nominally appointed by the Mayor of Kansas City as a device to achieve public honor and esteem in the elevation of the nominee for director from each of the Model Cities citizen participation organization boards. Each of the seven (7) Model Cities neighborhoods had a citizen participation board chosen in public elections. The Trial Court found that the fact that the Mayor appointed or elevated nominees to the Board of Emergency Assistance, Inc. pursuant to the by-laws of this not-for-profit corporation did not give the City control of that Board. The power of appointment does not give the appointing authority control as this Court well knows since its justices are appointed by the President but not thereby controlled.

After an Executive Director of the Corporation departed, Petitioner applied for the position but was rejected by the Board of Directors composed mostly of women. Afterward the Petitioner approached the Chairman of the Personnel Committee, an elderly male post office employee, asking him why she had not received the appointment. Unfortunately, in a fatherely gesture of consolation to a young woman he made various remarks which did include his statement not precisely recorded but to the effect that the position was not one for a woman. At trial, the gentleman testified that his decision was based upon his assessment of qualifications and that it was not based on sex as he had seemingly indicated in his ill-fated attempt at pacification after the decision had been made. That unfortunate statement by the gentleman is the basis for this case and the totality of the evidence in support

of the Petitioner's position. The Trial Court, of course, did not reach these Title VII factual issues since it found jurisdiction lacking under 42 USC §2000e (b).

Petitioner's statement of the case is inaccurate in not clearly stating that all activities of Emergency Assistance, Inc., at the request of the City, were pursuant to a contract which made the corporation a subcontractor with the City to provide services. The Petitioner's statement at page 15 of the petition for a writ of certiorari that with regard to employment vacancies the corporation and City would "advertise and interview simultaneously" is unsupported by the evidence, somewhat incomprehensible and simply untrue. It is true that at the behest of HUD the contract between the corporation and the City contained many provisions for the benefit of Model Cities neighborhood residents including preferential hiring. HUD imposed fiscal responsibility required provisions to limit wages to no more than for comparable city positions, prohibition of conflicts of interest, anti-kickback provisions etc. as this Court is familiar with in boilerplate for federal grant contracts.

REASONS FOR GRANTING (OR REFUSING) THE WRIT

The Petitioner suggests that the 8th Circuit decision below conflicts with decisions of other Circuits, but in fact such is not true. Respondent will attempt to briefly review cases cited by the Petitioner to refute Petitioner's contention.

Trevino v. Celanese Corporation, 701 F.2d 397 (5th Cir. 1983).

This case involves hiring and promotion between two (2) private corporations with inter-related operations and ownership. This case does not involve combining a City and a not-for-profit corporation as an "employer" under 42 USC §2000e (b). It is not in point as to any issues raised in this case.

Baker v. Stuart Broadcasting Company, 560 F.2d 389 (8th Cir. 1977).

The Respondents urged that the corporation and the City could not be considered joint employers or "employer" under 42 USC §2000e (b) pursuant to *Baker* which required consideration of four elements all of which must be considered and which in this case include (1) the degree of inter-relation between the City's operations and those of Emergency Assistance, Inc., (2) the degree of common management of the two entities, (3) the degree of centralized control of labor relations as between the two entities, and (4) the degree of common ownership or financial control of the two entities. The Trial Court applying the four factor test of *Baker* found that the two entities did not constitute a single "employer" within the meaning of such term in 42 USC §2000e (b).

Ayres v. International Brotherhood of Electrical Workers, 666 F.2d 441 (9th Cir. 1982).

This case states political subdivisions are not "employers" for purposes of the provisions of the Labor Management Relations Act governing suits for violations of contract between employers and labor organizations or between labor organizations. It is irrelevant to the issues raised in this case.

Dumas v. Town of Mount Vernon, Alabama, 612 F.2d 974 (5th Cir. 1980).

This case involved as defendants the Town and its officials. There was no jurisdiction under the Civil Rights Act of 1964 because the town did not have fifteen (15) employees. There was no attempt to aggregate entities as "employer" under 42 USC §2000e (b) in order to achieve the threshold number of 15. This case is not in point as to any issue in this case.

Curran v. Portland Superintending School Committee, etc., 435 F.Supp. 1063 (D.Maine, 1977).

The Court found that the City, School Committee and individual defendants in their capacities as agents all qualified as "employers". This case did not involve aggregating entities to achieve the jurisdictional number of 15 employees. This case is not in point and of course it is a District Court case.

Oaks v. City of Fairhope, Alabama, 515 F.Supp. 1004 (S.D.Alabama, 1981).

In this District Court case, the Court pondered *Baker,* supra, and declined to apply the four factor test of *Baker* stating "whether the Court applies the four *Baker* factors or undertakes a more general factual analysis, the ultimate conclusion is the same—the City of Fairhope and the Library Board are not joint employers." The Court concluded that the City and Library Board established by Alabama law could not be combined to achieve the jurisdictional number of 15 employees under 42 USC

§2000e (b). If this case is in point it supports Respondents' position, but does not indicate a divergence of the Circuits.

It is notable that the court in *Oaks* cited *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) for the proposition that Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike. *Oaks,* 515 F.Supp. at 1036.

Quijano v. University Federal Credit Union, 617 F.2d 129 (5th Cir. 1980).

This case is not in point because it does not address combining entities to achieve the jurisdictional number of 15 under 42 USC §2000e (b). This case finds that the Credit Union cannot claim the "private membership club" exception under 42 USC §2000e (b), but it does not address the 15 employee jurisdictional question.

Rogero v. Noone, 704 F.2d 518 (11th Cir. 1983).

In this case, the Plaintiff sued the tax collector in his personal and official capacities. The Putnam County Tax Collection Department had less than 15 employees. The tax collection office was obviously a mere subdivision of the real employer, the County, but for unexplained reasons Plaintiff refused to name the County. This refusal was rewarded by dismissal for failure to meet the jurisdictional number. While this case may support Respondents as to result, it really is not in point.

Spirt v. Teachers Insurance and Annuity Association, 691 F.2d 1054 (2nd Cir. 1982).

In this case, the term "employer" was stretched to cover an insurance association existing to provide insurance and retirement benefits for 40% of colleges nation-

wide. Because the Professor was employed by a college utilizing the association, the association in addition to the college was found to be her "employer" to achieve Title VII jurisdiction as to a sexually discriminatory rate table. While this case may stand for an extraordinary definition of "employer" it does not bear upon the jurisdictional number of 15 employees and Respondent suggests semantic flexibility cannot denigrate the arithmetic specificity of the jurisdictional threshold of 15 employees without savaging the language and the intent of Congress. This case simply is not in point.

Vanguard Justice Society, Inc. v. Hughes, 471 F.Supp. 670 (D.Maryland, 1979).

In this case the Court concluded that the term "employer" was broad enough to include the City of Baltimore, the Baltimore Civil Service Commission and the Baltimore Police Department. This Respondent suggests that this case is not in point.

PETITIONER'S CONCERN WITH THE DISSENTING OPINION OF THE COURT OF APPEALS

The dissenting opinion of the Court of Appeals in this case is interesting. The majority adopts the opinion of the Trial Court while the dissenting opinion would reverse the Trial Court with regard to application of the four factor test in *Baker* at 560 F.2d 392. The dissenter while approving *Baker* would limit its application to private companies and would not adapt *Baker* for application to any case involving a governmental entity. The dissenter would also ". . . hold that Emergency Assistance was the agent of the City of Kansas City and that the District Court's finding to the contrary was clearly erroneous.", *Massey,* 724 F.2d at 691. The dissenter is im-

pressed by the grant contract's requirements and conditions which he apparently believes give a degree of control indicative to him of agency although the fact finder at trial ruled otherwise. The dissenter goes on to state "a persuasive indicium of this control is the Mayor's power to appoint the Board of Directors of Emergency Assistance. Other indicia of the agency relationship are the requirement that Emergency Assistance file monthly reports with the CDA describing its activities and the basic requirement that the CDA be involved in virtually every important phase of Emergency Assistance's employment practices." *Massey,* 724 F.2d at 693. At trial the court did not find that an agency relationship existed. The dissenter seems impressed by the Mayor's proforma power of appointment although the trial court was not impressed. This Respondent suggests that the dissenter is confusing the Mayor's proforma power of appointment with the power to discharge, which is solely with the corporation's Board of Directors. The power of appointment should not be confused with the power to hire and fire which certainly is an indicia of control.

PETITIONER QUESTIONS WHETHER THE TRIAL COURT ERRED IN SUSTAINING THE CITY'S MOTION FOR DIRECTED VERDICT AGAINST PETITIONER'S CLAIM OF SEX DISCRIMINATION ASSERTED UNDER 42 USC §1983

The Trial Court sustained the City's Motion for a directed verdict because it heard no evidence of any action by any officer, agent or employee of Defendant City shown to be causally related to the matters of which Plaintiff complains and no showing of any "policy or custom" on the part of the City which was implicated in any alleged discrimination. In so ruling, a Court relied upon *Monell*

v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). With regard to the questionable 1983 claim against the not-for-profit corporation, at page 12 of Petitioner's Petition for Writ of Certiorari Petitioner states, "Petitioner voluntarily dismissed her Section 1983 claim against Emergency Assistance, Inc., because at the time of trial, Emergency Assistance, Inc. became defunct without no assets." After that voluntary dismissal, the jury was discharged and the remainder of the trial was to the court on the Title VII count.

CONCLUSION

The Writ of Certiorari should not be issued because the Petitioner has failed to document any diversity of opinion between the Circuits with regard to the issues of this case and the Petitioner has failed to demonstrate any clear error in the courts below.

Respectfully submitted,

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